SUNDRY GOODS, WARES AND MERCHANDISES, THE AMERICA. OR COMPANY, CLAIMANTS, PLAINTIFFS IN ERROR *vs.* THE UNITED STATES, DEFENDANTS IN ERROR.

Whatever an agent does or says in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal, and may be proved, as well in a criminal as a civil case, in like manner as if the evidence applied personally to the principal. [364]

Where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties in reference to the common object, and forming a part of the *res gesta*, may be given in evidence against the other. [365]

The act of 30th of March 1802, having described what should be considered as the Indian country at that time, as well as at any future time when purchases of territory should be made of the Indians; the carrying of spirituous liquors into a territory so purchased after March 1802, although the same should be at the time frequented and inhabited exclusively by Indians, would not be an offence within the meaning of the before mentioned acts of congress, so as to subject the goods of the trader, found in company with those liquors, to seizure and forfeiture. [368]

WRIT of error from the district court of the United States for the district of Ohio.

In the district court of Ohio, the district attorney filed, on behalf of the United States, a libel or information, stating that on the twenty-third day of September, in the year of our lord one thousand eight hundred and twenty-four, at and within the district of Indiana aforesaid, one William H. Wallace, a citizen of the United States, and having a license and legal authority to trade with Indian tribes within the territory of the United States, did take and carry into the Indian country, to wit, the country lying on the north or west side of the river Tippecanoe, for the purpose of trading with the tribes of Indians, sundry goods, wares, and merchandises, enumerating the same; that the said Wallace did, among the goods, wares and merchandises, carry into the said Indian country a large quantity of ardent spirits, to wit, seven kegs of whiskey, and one keg of shrub, for the purpose of vending or distributing the same among the Indian tribes, contrary to the statute in such cases made and

provided, and against the peace and dignity of the said United States.

The libel further alleged that John Tipton, Indian agent, at fort Wayne within said district, duly appointed to, and qualified for that office; and being duly authorised and instructed to search the stores and packages of traders among Indian tribes, upon suspicion that ardent spirits had been by the said Wallace carried into the said Indian country, for the purpose of being vended or distributed among the Indian tribes therein, caused the said goods, wares and merchandises to be searched, and upon such search, the seven kegs of whiskey, and the keg of shrub, were found so carried by the said Wallace into the said Indian country, for the purpose of being sold or distributed among the Indian tribes therein, contrary to the statutes aforesaid in such case made and provided, and against the peace and dignity of the said United States; the said goods, wares, and merchandises were, on the day and year aforesaid, seized by the said John Tipton, and now by him held to be disposed of as the court directs.

The libel then proceeds to pray that the goods, &c. so seized may be deemed to be forfeited, and be disposed of according to law.

A claim and answer were filed by William H. Wallace, attorney in fact and agent for the plaintiffs in error, in which the allegations of the libel were denied; and tendered an issue, upon which the cause was tried by a jury, who found a verdict for the United States. On the trial three bills of exception were taken by the claimants' counsel to the opinion of the court.

The first exception stated, as ground of error, that on the trial of this cause, the district attorney offered to give in evidence to the jury, the transactions and declarations of one John Davis, with a view to prove the purpose of the defendant; to which the defendant by his counsel objected, and the court permitted the district attorney to give in evidence to the jury, the conduct and declarations of Davis, so far as he acted as the agent of the said defendant, or in con-

junction with him, in relation to the charge made against the defendant in the information.

The second exception stated, that, on the trial of this cause, the district attorney moved the court to instruct the jury, that if they should believe from the evidence that had been adduced, that the defendant, as an Indian trader, did carry ardent spirits into the Indian country, and that the same were found therein among any part of his goods, that it is prima facie evidence of his having violated the acts of congress, on which this prosecution is founded, so as to throw the burden of proof upon the defendant; which instruction the court did give the jury; also instructing them that an Indian trader might lawfully carry ardent spirits into an Indian country for some purposes, as for instance, for medical use.

The third exception was, that at the trial of this cause, the defendant, by his counsel, prayed the opinion and direction of the court to the jury, that unless they are of opinion from the evidence of the cause, that the ardent spirits mentioned in the libel of information, were mingled with the bales of merchandise at the time of seizure, and carried into the Indian territory in violation of the act of 1820, entitled "an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," and whilst said spirits and goods were remaining in the Indian territory, were seized upon by the officers of government, their verdict must be for the defendant: which opinion and instruction the court refused to give to the jury; but did instruct the jury that if they should be of opinion, from the evidence, that the defendant, as an Indian trader, did carry ardent spirits into the Indian country, which were found with a part of his goods therein, with the purpose of being vended or distributed amongst the Indian tribes, that all the goods of said trader designed for sale under his license to trade with Indian tribes, and seized in the Indian country, whether all or only a part of them were found with the spirits, are forfeited; and that the seizure thereof in a territory purchased by the United States of the Indians, but frequented and inhabited exclusively by Indian tribes, is

legal; to which refusal of the court to instruct as requested, and to the instruction given, the defendant by his counsel excepted, &c.

The case was argued for the plaintiffs in error by Mr Ogden; and by Mr Wirt, attorney general, for the United States.

Mr Ogden, for the plaintiffs, stated, that as to the first exception, no other remark would be made upon it, but that if the declarations of Davis were made at the time of the seizure, the evidence was legal; but if at any other time, the testimony was irregular.

On the second exception he argued, that the statute of the United States being highly penal in its provisions, should be construed with great strictness. It was incumbent on the government to show, not only that the spirits were carried into the Indian country, but that the same was done with an intent to sell them. The jury were to judge of the intention; but this was taken from them, by the instructions given by the court.

The power to search must only be exercised within the Indian territory. The goods which may be seized must be in the territory; but the instruction given to the jury is in its terms so general, as to authorise a seizure of goods belonging to Indian traders in any part of the United States. He argued that this was not the sound interpretation of the law. In support of the third exception, he said that the act of congress applied only to those territories, in which the Indian title had not been extinguished. Those were exclusively the Indian country. "Indian country," ex vi termini, means the country *belonging to the Indians*; and it was not shown that the place of seizure was of this description.

The provisions of the law relative to licenses to trade with the Indians, sustain and illustrate this construction.

Mr Wirt, attorney general, considered the instructions given by the court right in every particular. A reference to the act of congress would show, that it was the Indian *country*, and not the Indian *territories*, from which it was intended to exclude the sale of spirituous liquors. Their

sale among the ignorant natives of the forest, led to war and bloodshed, and the evils were the same, on whichever side of the Indian line they were sold.

Such too is plainly the purpose, from the language of the act of 1802. The descriptive words are Indian "*country*," and not "territory." The act looks to all places where goods may be carried with the intent to vend them to the Indians, and the penalty is restricted to such offences. It also takes away the license to the trader.

In reference to the third instruction, he said, that the case stated that the ardent spirits were mingled with the merchandise, which is not the language of the law; the residue of the instruction is in accordance with the law. That language is "all the goods *designed* for sale under his license to trade with the Indians," and "which are seized in the Indian country." It cannot be a question, whether a country, although ceded to the United States, while inhabited by Indians continues an Indian country, within the view of the law. The license granted to trade is "with the Indians," and not in the Indian country.

Mr Justice Washington delivered the opinion of the Court.

This was an information filed in the district court of Indiana, by the United States, against sundry goods and merchandise, seized as forfeited under the provisions of two acts of congress, bearing date the 30th of March 1802, ch. 273, and the 6th of May 1822, ch. 58, for regulating trade and intercourse with the Indian tribes.

The information sets forth, in substance, that on the 24th of September 1824, William H. Wallace, a citizen of the United States, and having a license to trade with Indian tribes within the territory of the United States, did take and carry into the Indian country lying on the north or west side of the Tippecanoe river, for the purpose of trading with the tribes of Indians, certain goods, which are particularly described, amongst which were seven kegs of whiskey and one keg of shrub, for the purpose of vending or distributing the same among the Indian tribes; contrary to the statute, &c.

That upon suspicion that ardent spirits had been carried by the said Wallace into the said Indian country, for the purpose aforesaid, the said goods, &c. were searched by order of an Indian agent, duly appointed to, and qualified for that office; upon which search the said kegs of whiskey and shrub were found so carried, for the purpose aforesaid; and were, together with the said goods, &c. seized by the said Indian agent. The information concludes with a prayer, that the goods so seized may be declared to be forfeited, and to be disposed of according to law.

To this information, Wallace, as attorney in fact for the American Fur Company, interposed a claim and answer, which, after protesting against the sufficiency of the information, denies, by way of plea, that he did, among the goods, &c. in the information mentioned, carry into the Indian country, lying on the north or west of the Tippecanoe river, seven kegs of whiskey and one of shrub, for the purpose of trading, or distributing the same, among the Indian tribes, as in the information mentioned.

The issue was tried by a jury, who found a verdict in favour of the United States.

Upon the trial of the cause, three bills of exceptions, to the following effect, were taken.

The first is to the opinion of the court, which permitted the district attorney to give in evidence the conduct and declarations of John Davis, so far as he acted as the agent of Wallace, or in conjunction with him, in relation to the charge laid in the information, with a view to prove the purpose of the said Wallace.

The second bill states that, upon the motion of the district attorney, the court instructed the jury, that if they should believe, from the evidence, that Wallace, as an Indian trader, did carry ardent spirits into the Indian country, and that the same were found therein, among any part of his goods, it is prima facie evidence of his having violated the acts of congress, on which this prosecution is founded, so as to throw the burden of proof upon the defendant.

The defendant then moved the court to instruct the jury, that, unless they should be of opinion, upon the evidence,

that the ardent spirits mentioned in the information were mingled with the bales of merchandize at the time of seizure, and carried into the Indian territory, in violation of the act of 1802, and, whilst the said spirits and goods were remaining in the Indian territory, were seized by the officers of government, their verdict should be for the defendant. This instruction the court refused to give; and directed the jury, that if they should be of opinion, from the evidence, that the defendant, as an Indian trader, did carry ardent spirits into the Indian country, which were found with a part of his goods therein, with the purpose of being vended or distributed amongst Indian tribes; all the goods of the said trader, designed for sale under his license, and seized in the Indian country, whether all or only a part of them were found with the spirits, are forfeited; and that the seizure thereof in a territory purchased by the United States of the Indians, but frequented and inhabited exclusively by Indian tribes, is legal. This refusal, and instruction, form the subjects of the third bill of exceptions.

The objection to the evidence of Davis is so fully answered and repelled by this Court in the case of the United States *vs.* Gooding, 12 *Wheat.* 468, that it seems necessary only to refer to that decision. That was a criminal prosecution against the owner of a vessel, under the slave trade act of congress; and an objection was taken by his counsel to evidence of the acts and declarations of the master of the vessel, who was proved to have been appointed to that office by the defendant, with an authority to make the fitments for the vessel.

The principle asserted in the decision of that point, and applied to the case was, that whatever an agent does, or says, in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal; and may be proved, as well in a criminal as a civil case; in like manner as if the evidence applied personally to the principal.

The opinion of the court in the present case is not less correct, whether Davis was considered by the jury as having acted *in conjunction* with Wallace, or strictly as his agent.

For we hold the law to be, that where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the res gesta, may be given in evidence against the others; and this we understand, upon a fair interpretation of the opinion before us, to be the principle which was communicated to the jury.

The instruction to which the second exception was taken, having been passed over without objection by the counsel for the plaintiff in error, it becomes unnecessary for the Court to notice it otherwise than to say that it meets our entire approbation.

In order clearly to comprehend the subjects embraced by the third bill of exceptions, it will be proper to examine with attention a few of the sections of the acts on which this prosecution is founded.

The first commences in the 1st section, by declaring that a certain boundary line, therein described in general terms, as established by treaty between the United States and various Indian tribes, shall be clearly ascertained, and distinctly marked in such places as the President of the United States should deem necessary, and in the manner he should direct; with a proviso, that if the boundary line between the said Indian tribes and the United States should at any time thereafter be varied, by any treaty which should be made between the said Indian tribes and the United States, then all the provisions contained in that act should be construed to apply to the said line, so to be varied in the same manner as the said provisions apply, by force of that act, to the boundary line therein before recited.

The act then proceeds to prohibit citizens of, or residents within the United States, from crossing over the said boundary line to hunt, &c. and inflicts punishments of various degrees upon persons who should be convicted of certain other acts of aggression within the Indian country. By the 16th section, it is made lawful for the military force of the United States to apprehend every person who may be found in the Indian country, *over and beyond* the said boundary line, between the United States and the Indian tribes, in vio-

lation of any of the provisions of this act; and to convey them to the civil authority of the United States, in some one of the three adjoining states or districts, to be proceeded against in due course of law. We then come to the 21st section of this act, to which the act of the 6th of May 1822 is an amendment; which authorises the President of the United States to take such measures, from time to time, as to him might appear expedient, to prevent or restrain the vending or distributing of spirituous liquors among all or any of the Indian tribes.

The 2d section of the latter act, in execution of the power vested in the President of the United States by the preceding 21st section, authorises him to direct Indian agents, governors of territories, acting as superintendants of Indian affairs, and military officers; to cause the stores and packages of goods of all traders to be searched, upon suspicion or information that ardent spirits are carried into the Indian countries by the said traders, in violation of the aforesaid 21st section; and declares, that if any ardent spirits should be so found, all the goods of the particular trader should be forfeited, one half to the use of the informer, the other to the use of the government; and that his license should be cancelled, and his bond put in suit.

The difference between the instruction asked for by the defendant's counsel, which the court refused to give, and that which was given in the first part of this exception, consists in this; that the former *would seem* to insist, (for this branch of the exception is very ambiguously expressed, and is on that ground objectionable), that to produce a forfeiture of the trader's goods, the ardent spirits must be found mingled with the bales of goods at the time of seizure in the Indian country; and that no part of the goods but that with which the spirits were found so mingled, were liable to seizure. It is very apparent from the manner in which the instruction which was given is expressed, that that asked for by the defendant's counsel was understood by the court below as we have interpreted it.

But the instruction which was given asserts the law to be, that if the ardent spirits were found *with a part only* of the

goods carried into the Indian country, for the illegal purpose stated in the information; *all the goods* of such trader designed for sale under his license, and seized in the Indian country, were liable to forfeiture.

This construction of the acts of congress which have been referred to, is, in the judgment of this Court, well warranted by the words of those acts; as well as by the obvious policy which dictated them. The expressions "all the goods of the said traders" in the 2d section of the last act, although general enough, if they stood alone, unexplained by the context, to embrace all the goods belonging to the trader wherever they might be found; are clearly restrained by the provision which immediately precedes them, so as to mean those goods only which might be found in company, though not in contact with the interdicted article.

The notion that those goods alone are liable to seizure and forfeiture, amongst which the ardent spirits are found mingled, can receive no countenance from any fair construction of this section. That which is contended for would enable the trader, by the most simple contrivance, to protect the whole of his other goods from forfeiture. To effect this, he would only have to keep the spirits separate from his other goods during their transportation to, and after their arrival in the Indian country, so as not to contaminate those goods by placing them in immediate contact with the offending article. A construction which would sanction so glaring an evasion of the whole policy of the law, ought in no case to be adopted, unless the natural meaning of the words of the act require it. Even penal laws, which, it is said, should be strictly construed, ought not to be construed so strictly as to defeat the obvious intention of the legislature. This was laid down as a rule by this Court, in the case of the United States *vs.* Wiltberger, 5 *Wheat.* 56.

We are, therefore, of opinion, that the instruction asked for by the defendant's counsel was properly refused, and that that which was given, so far as it has been examined, is unexceptionable.

The latter part of this instruction remains now to be considered. After stating to the jury, that if they should be of

opinion, that the defendant, as an Indian trader, did carry ardent spirits into the Indian country, which were found with a part of his goods therein, with the purpose of being vended or distributed amongst Indian tribes; all the goods of the said trader designed for sale under his license, *and seized in the Indian country*, were forfeited; the instruction proceeds as follows; "and that the seizure thereof, in a territory purchased by the United States of the Indians, but frequented and inhabited exclusively by Indian tribes, is legal."

We have found no little difficulty in understanding the real meaning of the court, from the language in which this latter proposition is expressed; whether it was intended to state, that after the goods with the ardent spirits had been carried into the Indian country with the unlawful purpose, they might be seized in a country purchased of the Indians by the United States, under the circumstances referred to; or that being carried into this latter district of country, and there seized, such seizure would be legal.

We rather incline to the opinion that the latter interpretation was the one intended by the court, and that that part of the sentence was merely added as explanatory of the terms *Indian country*, which had previously been used. For if it was merely meant to affirm, that, after the forfeiture had attached in the Indian country, the goods might be seized any where out of that country; no reason is perceived why the place of seizure should be confined to a territory purchased by the United States of the Indians, and inhabited exclusively by them, rather than to a territory not so purchased and inhabited. Besides, the proposition asserted in the preceding part of the instruction, being, that ardent spirits carried into the Indian country, with the unlawful purpose, and found with a part of the trader's goods, and *seized in the Indian country*, subjected all his goods found with spirits to forfeiture; it would seem something like a contradiction, to lay it down as a distinct proposition, that the seizure spoken of might be made out of the Indian territory. As explanatory of the expressions before noticed, it was entirely appropriate.

If we have rightly interpreted this part of the instruction, we feel no hesitation in saying, that we cannot accede to the correctness of the instruction thus qualified; since it would subject to seizure and forfeiture, all the goods of the trader carried into a country, not only belonging to the United States, but lying without the boundaries of the Indian country, as they are described by the 1st section of the act of 1802; to which all the provisions contained in that act, and consequently those contained in the emendatory act of 1822, are by that section expressly confined. If the country referred to in this instruction was purchased of the Indians subsequent to the 30th of March 1802, so as that the boundary line thereby became varied; then the above section declares that all the provisions of that act, shall be construed to apply to the boundary line so to be varied, in the same manner as they apply by force of that act to the boundary line therein recited.

If we misunderstand the meaning of this instruction, it is so probable that it might have been misunderstood by the jury, that justice demands a re-trial of the cause.

The judgment of the court below is to be reversed, and the cause remanded to that court, with instruction to award a venire de novo.

This cause came on to be heard on a transcript of the record from the district court of the United States for the district of Indiana, and was argued by counsel; on consideration whereof, it is considered, ordered, and adjudged by this Court, that the judgment of the said district court in this cause be, and the same is hereby reversed and annulled, and that the cause be, and the same is hereby remanded to the said district court, with directions to award a venire facias de novo.